

**STATE OF WISCONSIN**  
**Department of Industry, Labor & Human Relations**

*In the Matter of the PECFA Appeal of*

Steven Schmitz  
Waukesha County  
1320 Pewaukee Road  
Waukesha WI 53188

PECFA Claim #53151-5151-84  
Hearing #95-15

**Final Decision**

**PRELIMINARY RECITALS**

Pursuant to a petition for hearing filed December 5, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, this matter was scheduled for a hearing. In lieu of a hearing, the parties agreed to the issuance of a proposed decision on the basis of a written stipulation of facts and written briefs. A proposed decision was issued on January 10, 1996, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the department's decision denying reimbursement to the appellant for \$8,705.38 in unitemized charges for cleanup costs was reasonable.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Steven Schmitz  
Waukesha County  
1320 Pewaukee Road  
Waukesha WI 53188  
By: Steven R. Schmitz  
Waukesha County Corp. Counsel  
1320 Pewaukee Road  
Waukesha WI 53188

Department of Industry, Labor and Human Relations 201 East  
Washington Avenue  
P.O. Box 7946  
MADISON WI 53707-7946  
By: Kristiane Randal  
Assistant General Counsel  
P.O. Box 7946  
Madison WI 53707-7946

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated October 20, 1995.

The matter now being ready for decision, I hereby issue the following

#### FINAL DECISION

The Proposed Decision dated January 10, 1996, is hereby adopted as the final decision of the department.

#### NOTICE TO PARTIES

##### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied,

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

##### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: 3-28-96

Richard C. Wegner, Deputy Secretary  
Department of Industry, Labor & Human Relations  
P O Box 7946  
Madison WI 53707-7946

cc: Parties in Interest and counsel

**STATE OF WISCONSIN  
DEPARTMENT OF INDUSTRY LABOR AND HUMAN RELATIONS**

IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by

MADISON HEARING OFFICE  
1801 Aberg Ave., Suite A  
P.O. Box 7975  
Madison, WI 53707-7975

Telephone: (608)242-4818  
Fax-. (608)242-4813

Waukesha County

**Hearing Number:** 95-15  
**Re: PECFA Claim #** 53151-5151-84

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. AnV party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison ' WI 53707-7975. After the objection period, the hearing record will be provided to Richard C. Wegner, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

**STATE HEARING OFFICER:**  
Arthur J. Schneider

**DATED AND MAILED:**  
January 10, 1996

**MAILED TO:**

**Appellant Agent or Attorney**

Steven R. Schmitz  
Principal Assistant Corp Counsel  
1320 Pewaukee Road, Room 330  
Waukesha, WI 53188  
(414) 548-7432

**Department of Industry, Labor  
and Human Relations**

Kristiane Randal  
Assistant Legal Counsel  
P.O. Box 7946  
Madison, WI 53707-7946  
(608) 267-4433

**STATE OF WISCONSIN  
BEFORE THE**

**DEPARTMENT OF INDUSTRY LABOR  
AND HUMAN RELATIONS**

Waukesha County  
515 West Moreland Boulevard  
Waukesha, WI 53188

Appellant,

vs.

PECFA CLAIM # 53151-5151-84

Secretary, Wisconsin Department of  
Industry, Labor and Human Relations

Hearing Number: 95-15

Respondent

PROPOSED DECISION

PRELIMINARY RECITALS

On December 5, 1994, the appellant filed a request for hearing, pursuant to section 101.02(6)(e), and Chapter ILHR 47.51(l) of the Wisconsin Administrative Code for review of a November 10, 1994, PECFA Grant Review Decision issued by the respondent.

In lieu of a hearing, the parties have agreed that a decision may be issued on the basis of the written "Briefs" and "Stipulations of Fact" submitted to the Administrative Law Judge, Arthur J. Schneider.

The issue for determination is whether the department's decision dated November 10, 1994, not to approve a request by the appellant for reimbursement of subcontractor costs in the amount of \$8,705.38 under the Petroleum Environmental Cleanup Fund Act ("PECFA") was correct.

PARTIES IN INTEREST:

Waukesha County  
by: Steven R. Schmitz  
Principal Assistant Corp Counsel  
1320 Pewaukee Road, Room 330  
Waukesha, WI 53188

Department of Industry, Labor and  
Human Relations  
Division of Safety and Buildings by:  
Attorney Kristiane Randal Assistant  
General Counsel, DILHR  
P.O. Box 7946  
Madison, WI 53707-7946

FINDINGS OF FACT

1. On or about May 3, 1991, while a Waukesha County road reconstruction project was underway at National Avenue and Coffee Road in Waukesha County, Arby Construction Company (under contract to Wisconsin Gas Company) discovered the existence of an underground storage tank within the highway right-of-way.

2. The engineering firm of Foth and Van Dyke, which had been under contract to Waukesha County since 1989 for underground storage tank management services, began environmental monitoring at the site. The Foth and Van Dyke services were primarily management and consultant in nature, with much of the "hands on" work subcontracted by Foth and Van Dyke to others.

3. Midwest Petroleum Service Inc. (Midwest) was hired by Foth and Van Dyke to excavate, haul; and dispose of contaminated soil. Waukesha County had no contractual relationship with Midwest or any other subcontractor hired by Foth and Van Dyke.

4. Midwest billed Foth and Van Dyke \$25,700.00 for its portion of the project, and Foth and Van Dyke paid Midwest this amount. Foth and Van Dyke then billed Waukesha County \$71,380.03 for the total project, which included the services by Midwest, and Waukesha County paid this amount.

5. On October 21, 1993, Waukesha County made a claim to the PECFA program for \$71,380.03.

6. In May, 1994, Waukesha County was advised by the PECFA grant reviewer that the county needed to provide itemization for the two Midwest invoices in the amount of \$20,730 and \$4,970. The department made a further request for this information in September, 1994.

7. Waukesha County attempted to obtain the itemization requested by the department from both Foth and Van Dyke and also Midwest. it could only obtain itemization for \$16,822.73 of the \$25,700.00. it provided additional documentation for this \$16,822.73. The Department issued a decision that the balance -- the unitemized \$8,703.38 -- was ineligible for reimbursement. It is that decision which the County has timely appealed.

## DISCUSSION

In section 101.143(3)(f), Wis. Stats., a claimant is required to submit a claim which:

Shall contain all of the following documentation of activities, plans and expenditures associated with the eligible cost incurred because of a petroleum products discharge from a petroleum products storage system;

1. A record of investigation results and data interpretation.
2. A remedial action plan.
3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.
4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.
5. The written approval of the Department of Natural Resources under paragraph (c)4.

6. Other records and statements that the department determines to be necessary to complete the application.

The above statute places the burden upon the appellant to provide documentation necessary for the department to determine whether the expenditures in the amount of \$8,705.38 falls within the statutory categories eligible for reimbursement.

The appellant contends that it has met that burden simply because the \$8,705.38 was part of a total payment of \$71,380.03 which actually was paid to the engineering firm of Foth and Van Dyke, which was under contract to the appellant to provide underground storage tank management services. This contention cannot be sustained. In order for the department to determine whether the, \$8,705.38 was an expenditure eligible for reimbursement the appellant needed to show more than a mere inclusion of costs. The appellant must provide documented evidence of the specific services provided, the cost of each service, and the amount of each service provided. Without such documentation the department cannot reasonably be expected to ascertain with any certainty that the payment of \$8,705.38 was for actual eligible costs incurred because of the discharge as required by the statute. Accordingly, the claimant has not met the burden of providing documentation necessary to show that the \$8,705.38 portion of the payment made to Midwest was for actual costs eligible for PECFA reimbursement.

## CONCLUSIONS OF LAW

The department properly denied the appellant's request for reimbursement under the PECFA program of \$8,705.38 in unitemized charges.

## PROPOSED DECISION

The appeal tribunal therefore finds that the decision of the Department of Industry, Labor and Human Relations dated November 10, 1994, denying the appellant's request for reimbursement of subcontractor costs in the amount of \$8,705.38 under the PECFA program was correct and is hereby affirmed.

Dated this 10th of January, 1996.

APPEAL TRIBUNAL

by-

Arthur J./Schneider  
Administrative Law Judge  
Madison Hearing Office  
1801 Aberg Avenue, Suite A  
P.O. Box 7975  
Madison, WI 53707-7975